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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 1232

RICHARD L. ROUDEBUSH,

Appellant,

v.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

No. 1236

THEODORE L. SENDAK
ATTORNEY GENERAL OF INDIANA,

Appellant,

v.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND RICHARD L. ROUDEBUSH,

---

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

BRIEF FOR APPELLEE HARTKE

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional and statutory provisions set out in the appellants' briefs, an additional provision of the Indiana Constitution, Article 4, Section 10, and certain additional provisions of the Indiana Election Code are pertinent to the court's consideration of the issues herein. The text of such provisions is set forth in the Appendix, *infra*, pages A-1 to A-18.

Three appendices have been filed with this court. The proceedings in the district court are set forth in a separately bound Appendix, which shall hereinafter be cited as "A. [page no.]". Article 27 of the Indiana Election Code, containing the statutory provisions governing a recount, are set forth in an appendix to the Brief for Appellant Roudebush, which shall hereinafter be cited as "Roudebush Appendix A-[page no.]". Other pertinent provisions of the Indiana Election Code are set forth in the Appendix to this Brief, and shall hereinafter be cited as "Hartke Appendix A-[page no.]".

QUESTIONS PRESENTED

1. Whether the invocation of the Senate's exclusive constitutional jurisdiction to determine appellee Hartke's right to membership in that body has rendered the issues presented by these appeals moot.

2. Whether a recount proceeding under the Indiana Election Code is a "proceeding in a State court" to which the anti-injunction statute, 28 U.S.C. §2283, applies.

3. Whether Article 27 of the Indiana Election Code, insofar as it establishes a procedure for a recount of votes in a United States senatorial election, conflicts with the provisions of Article 1, Section 5, of the Constitution of

the United States, which provides that the Senate shall be the judge of the elections, returns and qualifications of its members.

SUMMARY OF ARGUMENT

The exclusive jurisdiction of the United States Senate to determine appellee Hartke's right to membership in that body attached when Hartke presented his certificate of election and claimed his seat. Any matters touching upon conflicting claims to that seat are exclusively for the Senate to determine, and the issues presented by this appeal are therefore moot.

The conduct of a recount under Article 27 of the Indiana Election Code, is a non-adversary, non-reviewable, administrative proceeding. Such a proceeding, though carried out by a commission appointed by a state trial court, is not a "proceeding in a state court" within the meaning of 28 U.S.C. §2283, and that statute did not prohibit the issuance of a preliminary injunction by the district court.

Since the Indiana recount statute had been three times found to interfere with the constitutional prerogative of the Indiana legislature to judge the election and returns of its members, the district court had no occasion to abstain in deciding the federal constitutional question. The settled interpretation of the character and effect of recount proceedings by the Indiana Supreme Court, and the facts before it, compelled the district court's conclusion that such proceedings encroach upon the constitutional obligation of the Senate under Article 1, Section 5. In consideration of plaintiff's prayer for both declaratory and injunctive relief, the district court was obligated to resolve the constitutional question entirely apart from those facts which justified the granting of injunctive relief.

ARGUMENT

I. The jurisdiction of the Senate to determine the right of appellee Hartke to membership in that body having been invoked, any determination by this court would be wholly nugatory, and the controversy is therefore moot.

The explicit basis upon which appellant Roudebush filed his petitions for recount in eleven Indiana counties was that "petitioner desires to contest said election in respect of said office [of United States Senator]." A. 10. Such language is specifically required under the recount statute. Burns Ind. Stat., §29-5405; Roudebush Appendix A-4. The basic issue was then—and is now—whether appellee Hartke or appellant Roudebush is entitled to the office of United States Senator from Indiana.

Article I, Section 5 of the United States Constitution invests the United States Senate with the exclusive authority and obligation to determine that entitlement to office, and full power to do all things necessary to the performance of that duty. That principle is universally recognized and not disputed by any of the parties. See *Laxalt v. Cannon*, 80 Nev. 588, 590, 397 P.2d 466, 467 (1964).

On November 23, 1970, the Indiana Secretary of State certified to the Governor the results of the voting for the office of United States Senator. Plaintiff's Exhibit 1; A. 82, 85. On December 3, 1970, the Governor issued to appellee Hartke a certificate of election based upon such certified results. Plaintiff's Exhibit 2, A. 82, 85. On January 21, 1971, appellee Hartke presented himself to the Senate, claiming membership therein, and was duly sworn and seated. 119 Cong. Rec. (daily ed., Jan. 21, 1971) S 4.

In *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867 (1929), William S. Vare was elected to the United States Senate from Pennsylvania, but was not permitted to take the oath of office pending the Senate's investigation into allegations of fraud and corrupt practices in connection with his nomination and election. It was argued that the Senate had no power to investigate because Vare had not been seated, and was therefore not a "member" whose election, qualifications, and returns were subject to scrutiny under Article I, Section 5. In answering this argument, the court said:

> It is enough to say of this that upon the face of the returns he had been elected, and had received a certificate from the Governor of the state to that effect. Upon these returns and with this certificate, he presented himself to the Senate, claiming all the rights of membership. Thereby the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of section 5 of article 1 of the Constitution.
>
> 279 U.S. 614, 49 S.Ct. 455, 73 L.Ed. 872

The jurisdiction of the Senate to determine and adjudicate the right of appellee Hartke to his seat in that body has been invoked. Whatever may have been Roudebush's rights at an earlier moment, no pronouncement by this court can now divest that tribunal of its exclusive juris-

diction; nor can any such pronouncement presently invest the state recount proceedings with any meaning or effect.[1]

This Court has recently had occasion to review and reconsider the Constitutional limitations upon the jurisdiction of the federal courts to "cases" and "controversies". *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Apropos to the present case is the following observation of Chief Justice Warren:

> Embodied in the words "cases and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government.

392 U.S. 94-95, 88 S.Ct. 1949-50, 20 L.Ed.2d 958-59.

This case, in its present posture, is not capable of resolution through the force of any determination by this court. Moreover any such determination would intrude into

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1. Roudebush filed recount petitions in eleven counties of the state. (Brief for Appellant Roudebush, p. 4, note 1) Under the recount statute, Hartke was entitled to file cross-petitions seeking recounts in other precincts of those counties, and in all the precincts of other counties. (Burns Ind. Stat., 29-5403, Roudebush Appendix, A-2 to A-4). Believing that the Senate was the exclusive forum for such matters, Hartke chose not to file cross-petitions. The inconclusiveness and futility of further consideration by this court as to whether any recounts shall or shall not be permitted is evident: if and when the Senate is asked to consider the claims of Roudebush to the seat in question, Hartke may properly ask it to consider the correctness of returns in precincts other than those comprehended by Roudebush's petitions, and to "re-recount" votes counted under the state procedure.

an area constitutionally committed to another branch of government.[2]

Nor is the fact of mootness avoided by the argument of the Attorney General that "[t]he State of Indiana requires a final decision as to the constitutionality of its recount statute for the guidance of public officials in future elections." Brief for Appellant Sendak, p. 4. No public official has any right in any event to institute or prosecute recount proceedings under the state election code. That right is reserved to candidates alone. Burns Ind. Stat. 29-5401; Roudebush Appendix, A-2. While it might be a matter of some interest on the part of the Attorney General as to whether the statute is or is not unconstitutional, no right or privilege inherent to his office or the performance of his duties will be affected one way or another by such a determination.[3] There is truly no case

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2. That the oath was administered to Senator Hartke, by unanimous consent of the Senate, "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." (117 Cong. Rec. S 4 (daily ed. Jan. 21, 1971)), does not save the case from mootness. Every senator is seated "without prejudice" in the sense that *the Senate* may at any time inquire into the merits of his title to the office. *Corbin v. Butler*, Report of Committee on Privileges and Elections, "Compilation of Senate Election Cases 1789-1885", S. Misc. Doc. No. 6, 52d Cong., 2d Sess., 547-48 (1893). But that right of inquiry is exclusively in the Senate, and nowhere else.

3. For the same reason, the order of the district court, granting the Attorney General leave to intervene, is of doubtful propriety. While 28 U.S.C. §2284(2) required the giving of notice of the hearing on the plaintiff's application for a preliminary injunction to the governor and attorney general, that statute did not grant them the right to intervene, nor does Rule 24, F.R. Civ. Proc. Rule 24(b) permits intervention by the state "officer or agency" which administers the particular statute or order in question. Here the Attorney

or controversy existing between appellant Hartke and appellee Sendak.

Further consideration of these appeals by this court would be "both officious and nugatory". *State ex rel. 25 Voters v. Selvig*, 170 Minn. 406, 212 N.W. 604 (1927). They should be dismissed for mootness.

II. A recount conducted under the provisions of the Indiana Election Code does not constitute "proceedings in a State court" within the meaning of Title 28, United States Code, Section 2283; accordingly, that section did not bar the three-judge district court's injunction against the recount commissioners and the appellant Roudebush.

The three-judge district court, after hearing, issued a preliminary injunction against Walker, Hammond and Butler (the three members of the recount commission) and appellant Roudebush, restraining and enjoining them from "taking any action whatsoever [under the provisions of the Indiana Election Code] . . . to conduct a recount for the office of United States Senator for the State of Indiana, in Marion County, Indiana, or elsewhere . . ." A. 51 The principal argument advanced by both appellants before this Court is that the "anti-injunction" statute, 28 U.S.C. 2283, stands as an absolute bar against the issuance of that injunction.

Title 28, United States Code, Section 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except

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General has nothing whatever to do with the recount procedure. See *McCrimmon v. Daley*, 418 F.2d 366, 368 (7th Cir. 1969); *Rodriguez v. San Antonio Independent School District*, 299 F.Supp. 476, 478 (W.D. Texas, 1969).

> as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[4]

The focus of the anti-injunction statute has been—and is—to preserve and reinforce the notion of comity between federal and state courts. *Younger v. Harris,* —— U.S. ——, 91 S.Ct. 746, 750, 27 L.Ed.2d 669, 675 (1970). In conformity with that intention, the proscription against use of the federal injunctive power applies to "proceedings in a State court", and not to administrative, legislative or executive proceedings. The historical discussion in *Toucey v. New York Life Ins. Co.,* 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941) leaves little doubt that the object of §2283 is to prevent interference with actual "litigation in the state court." 314 U.S. 132, 62 S.Ct. 143, 86 L.Ed. 104. Without doubt, the statute reaches all phases of a lawsuit from its inception to his final process, and so reaches even the possible interferences with execution and post-judgment procedures, but all of these assume that there has been a judgment in the first place. Administrative officers of a court can be regarded as exercising a judicial function and as part of a "proceedings" for

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4. The immediate predecessor of 28 U.S.C. 2283, Rev. Stat. 720, provided in pertinent part that:

> the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

An even earlier version of the same proscription against a writ of injunction "to stay any proceedings in state court" dates back to 1793. 1 Stat. 335 Ch. 22. The evolution of the anti-injunction statute is summarized in the dissenting opinion of Mr. Justice Douglas in *Younger v. Harris,* — U.S. —, 91 S.Ct. 746 at 762, footnote 3 (1971).

purposes of §2283 only when they are in the flow of an adjudicatory procedure. See e.g. *Mills v. Provident Life & Trust Co.*, 100 F.344 (9th Cir. 1900), holding that a sale on execution is a "proceedings" by the court, "culminating in a hearing and confirmation of the sale by the court." 100 F. 347. On the other hand, as the authorities, hereinafter cited plainly indicate, administrative, non-adjudicatory, non-adversary proceedings are not "proceedings in a state court" subject to Section 2283.

The Indiana recount procedure is of the latter character. The statutory procedure under which the appellant Roudebush purported to act is set out in Chapter 27 of the Indiana Election Code, Burns Ind. Stat. §§29-5401 through 29-5417. Roudebush Appendix, A-2 through A-11. Under the statutory scheme, a candidate desiring a recount initiates the procedure by filing "a verified petition" in a trial court of general jurisdiction for each of the counties containing a voting precinct or precincts in which a recount is sought. Burns Ind. Stat. 29-5403; Roudebush Appendix A-2. The candidate "who, on the face of the election returns is elected" has the right to file cross-petitions for recount in precincts or (in the case of state-wide offices) in counties other than those designated in the original petitions, Burns Ind. Stat. 29-5403; Roudebush Appendix, A-2. Each petitioner is also required to provide a minimum bond of $100 insuring the payment of the costs of the recount. The required bond is increased by $10 for each precinct in excess of ten designated in the recount petition. Burns Ind. Stat. 29-5408; Roudebush Appendix, A-5.

Twenty-five days after the election, the court in each county in which a recount petition has been filed appoints a three-man recount commission, to make a recount of the

votes in the precincts specified in the petition and cross-petition, if any. Burns Ind. Stat. 29-5409; Roudebush Appendix, A-6. Two of the recount commissioners are required to be members of opposite political parties. The third is required to be "a competent mechanic . . . familiar with voting machines". Burns Ind. Stat. 29-5410; Roudebush Appendix, A-7.

A court in which a recount petition is filed is required to impound the voting paraphernalia from the precincts to be recounted and to make it available to the recount commission. Burns Ind. Stat. 29-5413; Roudebush Appendix, A-7. On a day fixed by the court, the recount commission convenes to "commence" and "expeditiously complete" the recount.[5] Candidates, their watchers, and members of the press are entitled to observe the recount proceedings. Burns Ind. Stat. 29-5411; Roudebush Appendix, A-7.

Upon completion of the recount, the recount commission files with the clerk of the circuit court "its certificate showing the total number of votes received" in the recounted precincts by each candidate, including a statement as to which candidate "received the highest number of votes . . . and by what plurality. . . ." Insofar as a recount

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5. The statute gives the recount commission no further guidance or instructions in the performance of their duties. As the undisputed evidence before the district court shows, the practice in Indiana in conducting recounts has been that the recount commission does not confine itself to a mathematical verification of the votes counted and returned by the precinct election boards in the contested precincts. Rather, the commission substitutes its judgments for that of the precinct election boards and may determine, under some circumstances by a 2-1 partisan vote, not to count votes counted and returned by the precinct board, or to count votes not counted by the precinct board. See further discussion under Part IV of this Brief, *infra*, p. 21.

for the office of United States Senator is concerned, the certificate of a recount commission "supersede[s] for all purposes all previous returns". Burns Ind. Stat. 29-5414; Roudebush Appendix, A-8.

If the clerk of the circuit court, upon review of the recount commission's certificate, finds that its count differs from that tabulated by the county canvassing board, he is required to make and transmit to the secretary of state a new certificate, reflecting the vote as found by the recount commission in his county. The secretary of state corrects the total state-wide vote tabulation to reflect the changes reported in the certificates received from counties in which recounts were conducted. He then issues a new commission or certificate of election to the candidate shown by the corrected tabulation to have received the highest number of votes. Burns Ind. Stat. 29-5414; Roudebush Appendix, A-8.

No provision of the Indiana Election Code, nor any other provision of state law, provides for direct appellate review of the determination of a recount commission with respect to an election for the office of United States Senator.

As the foregoing summary indicates, the role of the court in the recount proceedings is simply to appoint the recount commission. The court finds no facts and enters no judgment, nor does any direct judicial review lie from the recount commission's determination. Although each affected candidate is entitled to be present himself and to have a "watcher" present, the recount proceedings are not adversary in character, and the candidates have no right to participate in them. The commission—and not the court or the candidates—conducts the recount. Indiana courts (and both appellants) recognize the ministerial—rather than judicial—character of recount proceedings. See

State ex rel. McCormick v. Superior Court of Knox County, 229 Ind. 118, 95 N.E.2d 829 (1951); *State ex rel. Watson v. Pigg*, 221 Ind. 23, 46 N.E.2d 232 (1943); Brief for Appellant Roudebush, pp. 32-33; Brief for Appellant Sendak, p. 22.

Where the function of the court is not judicial, as thus determined, the anti-injunction statute has no application to it at all. In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908), a bill in equity was brought to enjoin the members and clerk of the Virginia State Corporation Commission—a body expressly assumed by Justice Holmes to be a "court"—from publishing or taking any other steps to enforce a certain order fixing passenger rates. It was argued that Revised Statutes §720 (the predecessor of 28 U.S.C. §2283) barred an injunction. In rejecting this argument, Mr. Justice Holmes observed:

> The State Corporation Commission is established and its powers are defined at length by the Constitution of the state. There is no need to rehearse the provisions that give it dignity and importance, or that add judicial to its other functions, because we shall assume that, for some purposes, it is a court within the meaning of Rev. Stat. §720, and in the commonly accepted sense of that word.
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> • • • • •
>
> But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place within a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by §720.
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> • • • • •
>
> Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev. Stat. §720, no matter what may be the general or dominant character

> of the body in which they may take place. [citations omitted] That question depends not upon the character of the body, but upon the character of the proceedings. Ex parte Virginia, 100 U.S. 339, 348, 25 L.Ed. 676, 680. * * *
> 211 U.S. 224-226, 29 S.Ct. 69, 53 L.Ed. 158-159.

A similar result was reached in *Central Electric & Gas Co. v. City of Stromberg, Neb.*, 192 F.Supp. 280 (D. Neb. 1960), aff'd 289 F.2d 217 (8th Cir. 1961). A provision of Nebraska law provided for submitting to voters the question of exercising the power of eminent domain to acquire certain privately owned public utilities. The statute provided for the certification of an affirmative vote in such an election to the state supreme court. Upon such certification the supreme court was required to appoint three state district judges from three judicial districts as a court of condemnation, and to prescribe the procedure to be followed by such court in formulating a record in the condemnation proceeding and making an appraisal of the property taken. The statute made their finding of value and the condemnation award appealable to the district court of the state and to the state supreme court.

An action was brought in the federal district court to enjoin any further proceedings before a court of condemnation already designated by the state supreme court. In response to the argument that 28 U.S.C. §2283 barred the granting of an injunction, the court said:

> . . . the quoted section of the United States Code is simply inapplicable. The action of the Supreme Court of Nebraska in erecting the Court of Condemnation was not a judicial but rather a ministerial act. The Court of Condemnation is not itself a court; and this is no less true though its members are by law required to be selected from among the judges of the state's

> courts of record of general jurisdiction. It is simply a board of appraisers, whose membership, by statutory mandate, is necessarily recruited from the personnel of the state's judiciary. Moreover, the proceeding pending before it is not—at least not yet—a civil action. Such is the settled view of the Supreme Court of Nebraska. [citations omitted]
>
> 192 F.Supp. 295.

The case presenting perhaps the most direct analogy to the case at bar is *Weil v. Calhoun*, 25 F. 865 (Cir. Ct. N.D. Ga. 1885). A special Georgia statute gave the ordinary of a county, in addition to his duties as a probate judge, the duty of counting the vote, examining the returns, and declaring the results of a county election on a local option law. An action was brought in the federal court to enjoin the ordinary from performing his duties under this statute. In disposing of the contention that Rev. Stat. §720 barred the relief sought, the court stated:

> It is said that under section 720 of the Revised Statutes this court cannot grant the prayer of this bill because the ordinary is a state court, and that section prohibits any federal court from enjoining a court of any of the states, under any circumstances. I do not think that the ordinary, in the performance of the duties provided by this act of 1885 of the Georgia legislature, is a court, in the sense of that section. The universal practice of the states is to have some branch of the executive department to determine the results of an election. Indeed, all officers performing such duties are part of the executive department, and yet in all the states the rule is imperative that the executive and judicial departments should be kept distinct.
>
> 25 F. 871.

The conduct of a recount under the Indiana Election Code, by a recount commission appointed by a court, is a non-judicial function in the same sense as was rate-making in *Prentis*, appraisal in *City of Stromberg*, and counting the vote in *Weil*. There is no federal bar to Indiana's determination to vest the recount function generally in a "court".[6] But that determination does not alter the administrative nature of the recount, nor does it clothe administrative actions therein with the immunity conferred upon the state judiciary by §2283. The recount proceedings are not "proceedings in a State Court" with respect to which an injunction is barred by 28 U.S.C. §2283.[7]

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6. Federal courts, when given non-judicial functions to perform, have sometimes tended to be reluctant or have outright declined to perform them. See Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436 (1792) The line of distinction was classicly recognized in United States v. Ferreira, 13 How. 40, 14 L.Ed. 42, 45 (1851), an opinion in which Chief Justice Taney declined to pass upon an award of war damages as determined by a district judge of the United States for Florida. The court found that the trial judge was proceeding simply as a commissioner, and declined to review the matter because a "proceeding before a commissioner" is not "a judicial one."

7. An apparent dilemma appears in arguing, on the one hand, that recount proceedings are administrative—and non-adjudicatory—in character for purposes of determining the applicability of 28 U.S.C. §2283; and, on the other (Points III and IV, *infra*) that such proceedings permit and require "judging" of the election and returns and thereby encroach upon Article 1, Section 5. The dilemma is only apparent. One can readily catalog a whole host of proceedings clearly administrative in character in which the administrative body makes choices among conflicting alternatives based upon its resolution of disputed facts. To say that a particular proceeding is "non-judicial" in no sense excludes the possibility that it may require "judging"—with profoundly significant consequences. See *United States v. Ferreira*, note 6, *supra*, 13 How. 48, 14 L.Ed. 45.

III. The district court properly exercised its jurisdiction to determine that a recount with respect to a United States Senatorial election would interfere with the Constitutional prerogative of the United States Senate to judge the elections and returns of its members.

Appellants have cited and discussed at length cases from Nevada, Oklahoma, Minnesota, and Georgia[8] which state or imply that the "recount" proceedings provided by the statutes of those states, as applied to federal congressional elections, do not violate the provisions of Article I, Section 5 of the United States Constitution. In its majority opinion, the district court cited a considerably larger number of cases from other states in support of its conclusion that

> [t]he great weight of authority supports plaintiff's position that court proceedings for *recount or contest* with regard to an election for representative in the national House of Representatives or for United States Senator are unconstitutional, as in conflict with Article 1, Section 5 . . . [court's italics] A. 58-59.

Were the Indiana recount statute viewed only in the light of this apparent split in authority, and in the absence of any judicial gloss by the Indiana Supreme Court, the district court justifiably might have declined to exercise its jurisdiction and abstained to await clarification by the Indiana courts. But there was no necessity for the district court to "postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of

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8. Laxalt v. Cannon, 80 Nev. 588, 397 P.2d 466 (1964)
Wickersham v. State Election Board, 357 P.2d 421 (Okla. 1960)
Odegard v. Olson, 265 Minn. 439, 119 N.W.2d 717 (1963)
Blackburn v. Hall, 115 Ga. App. 235, 154 S.E.2d 392 (1967)

[uncertain] state law." *Harman v. Forssenius,* 380 U.S. 528, 534-35, 85 S.Ct. 1177, 1181-82, 14 L.Ed. 2d 50, 55 (1965). The state statute here questioned was not fairly subject to an interpretation which might modify or render unneeessary the federal constitutional question; the district court was under a duty to exercise its properly invoked jurisdiction. *Baggett v. Bullitt,* 377 U.S. 360, 375-76, 84 S.Ct. 1316, 1324-25, 12 L.Ed.2d 377, 387-88 (1964).

That conclusion is compelled by an examination of the three Indiana cases cited and discussed by the district court. In each of these cases, the Indiana Supreme Court was called upon to determine whether recount proceedings with respect to elections to the state legislature were constitutionally permitted under the provisions of Article 4, Section 10 of the Indiana Constitution, which provides that

> Each House . . . shall . . . judge the elections, qualifications and returns of its members.

In *State ex rel. Acker v. Reeves,* 229 Ind 126, 95 N.E.2d 838 (1951), disappointed candidates for the Indiana House of Representatives from Vanderburgh County filed a petition for recount in the Vanderburgh Circuit Court. The candidates prevailing on the face of the initially reported canvass sought a writ of prohibition from the Indiana Supreme Court. The court found the recount statute void and granted the writ upon the ground that the Indiana Constitution gave express and exclusive power to the general assembly to judge the elections and returns of its members. 229 Ind, 129-30, 95 N.E.2d 840.

In *State ex rel. Beaman v. Pike Circuit Court,* 229 Ind. 190, 96 N.E.2d 671 (1951), petitions were filed in two

counties to obtain recounts in an election for the office of joint state senator. A recount commission was appointed in each county. Again the Indiana Supreme Court prohibited the recounts. Noting that the recount statute was "void ab initio" insofar as it applied to members of the Indiana General Assembly, the court held that even if the conduct of a recount was merely ministerial in character, the unconstitutional statute conferred no jurisdiction whatsoever—whether for judicial *or* ministerial acts. 229 Ind. 193-94, 96 N.E.2d 672.

The court also rejected the argument made here by both appellants that "[b]asically, the recount proceeding is a means of discovery . . ." Brief for Appellant Roudebush, p. 32; Brief for Appellant Sendak, p. 22. The court noted that under the provisions of Burns Ind. Stat. 29-5414, the recount certificate superseded for all purposes all previous returns, and that under Burns Ind. Stat. 29-5415 "the candidate shown by such corrected tabulation to receive the highest number of votes . . . shall be entitled to a certificate of election . . . notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office." The court concluded that such provisions constituted or so nearly approached an adjudication of the elections and returns of members of the legislature "that it may interfere with the constitutional right of the Legislature to judge the elections and returns of its members. . . . [I]ts effect is more than a mere procedure for the discovery of evidence." 229 Ind. 196, 96 N.E.2d 673.

Following these decisions, the Indiana legislature in 1961 attempted to bring the Indiana law in conformity with the Indiana Constitution. It did so by excepting the offices of governor, lieutenant-governor, and members of the

general assembly from the proviso that the certificate of a recount commission would supersede for all purposes all previous returns; and providing for reference of a certified statement of the results of the recount to the general assembly "for such action as that body may find appropriate." Burns Ind. Stat. 29-5414; Roudebush Appendix, A-9. No changes were made in the recount statute insofar as it purported to be applicable to a United States Senatorial election.[9]

However, even this effort to legitimize recounts in legislative elections was found wanting. In *State ex rel. Batchelet v. DeKalb Circuit Court,* 248 Ind. 481, 229 N.E.2d 798 (1967), an unsuccessful state senatorial candidate filed a recount petition in the DeKalb Circuit Court. The senator-elect obtained a temporary writ of prohibition against the recount from the Indiana Supreme Court. While the matter was pending, the Indiana Senate convened and resolved the dispute. When the Indiana Supreme Court thereafter considered the matter, it made the writ of prohibition permanent, rather than dismissing the proceeding as moot, and quoted with approval from *Acker:*

> [The] right of legislative bodies to judge the election, qualifications, and returns of their own members is of ancient origin. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread. 248 Ind. 482, 229 N.E.2d 798-99.

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9. The argument of appellant Sendak that the 1961 amendment "explicitly limited the office of the recount to that of an informative function and nothing more", (Brief for Appellant Sendak, p. 21) is simply fallacious to the extent that it purports to relate to a United States senatorial or congressional election.

The scope and effect of the Indiana recount statute has thus been definitively stated by the courts of Indiana. Plaintiff's amended complaint sought both declaratory and injunctive relief against the unconstitutional application of that statute to a United States senatorial election. A. 39 Even if circumstances justifying the granting of injunctive relief had not been established by the evidence, the district court was bound to make the constitutional determination sought by Hartke in the court below. *Zwickler v. Koota,* 389 U.S. 241, 254, 88 S.Ct. 391, 399, 19 L.Ed.2d 444, 454 (1967).

On that question, the district court was confronted with the binding determination that, as a matter of law, recount proceedings for state legislative offices interfere with the constitutional authority of the general assembly to judge the elections and returns of its members as provided in Article 4, Section 10 of the Indiana Constitution. The identical language of Article 1, Section 5 of the United States Constitution compelled the district court to conclude that the same recount proceedings in respect to a United States senatorial election would interfere with the constitutional prerogative of the United States Senate to judge the elections and returns of its members and thereby encroach upon Article 1, Section 5.

IV. The facts, as well as the law, support the district court's determination that the conduct of a recount in the United States Senatorial election would interfere with the constitutional prerogatives of the Senate and irreparably damage appellee Hartke.

The determination of the district court that a recount would interfere with the ability of the Senate to perform its constitutionally imposed duties, and irreparably

damage appellee Hartke,[10] was supported not only by the clear pronouncements of the Indiana Supreme Court, but also by the uncontradicted evidence before it outlining, in practical terms, how a recount in Indiana is conducted. That evidence must be considered in light of the procedure by which the vote is initially counted, reported, and certified. (The pertinent statutory provisions are set out in Hartke Appendix, A-1 to A-18).

Each voting precinct is under the direction of a precinct election board, consisting of an inspector and two judges. Burns Ind. Stat. 29-3201; A. 91. After the polls close, the voting machines are opened and the votes registered on such machines are recorded on tally sheets. Burns Ind. Stat. 29-5110; Plaintiff's Exhibit 8-C; A. 92, 96. After the machine vote has been tallied, the machines are sealed by the precinct inspector. Burns Ind. Stat. 29-5111; 29-5206; A. 93-94, 99. The paper ballots, which include all absentee ballots, are removed from the ballot box, and opened.[11] Burns Ind. Stat. 29-4914. The paper ballots are

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10. Appellants asserted in the district court, and now argue, that the absence of an allegation of irreparable injury in plaintiff's complaint in the district court was fatal to the invocation of the court's equity jurisdiction. Appellant Roudebush wholly neglects to mention that plaintiff's original complaint was accompanied by a Verified Application for Temporary Restraining Order, which set forth at length the injury which Hartke would suffer if a recount were permitted to proceed. A. 27. The evidence presented by the plaintiff at the hearing on the temporary injunction was in large part specifically directed to that issue, and the court made specific findings thereon. Under such circumstances, the provisions of Rule 15(b), F. R. Civ. Proc., clearly overcome any pleading deficiency.

11. Although Indiana law authorizes and directs the county commissioners of every county in the state to procure voting machines for use in the various precincts of the county (Burns Ind. Stat. 29-5803), there were several counties in

then counted and tallied; any ballot bearing a distinguishing mark, or any mutilated ballot, or any ballot from which it is impossible to determine the elector's choice of candidates is not counted. The counted ballots are placed in one paper bag and sealed. Plaintiff's Exhibit 8-A; A. 95-96. The uncounted and defective ballots are placed in another bag and sealed. Plaintiff's Exhibit 8-B; A 95-96; Burns Ind. Stat. 29-5201. When the vote tally from both the machines and paper ballots is completed, a Certificate of Memoranda is prepared and certified by the precinct election board, summarizing the total vote tally. Plaintiff's Exhibit 8-D; A. 95-96. A copy of the tally sheet attested by the election board clerks, and the Certificate of Memoranda, are sealed in an envelope. Burns Ind. Stat. 29-5202; A. 97. The sealed envelopes and bags containing the ballots, counted and not counted, unused ballots, and tally sheet and Certificate of Memoranda are delivered by the precinct election board inspector to the county canvassing board. Burns Ind. Stat. 29-3212; 29-5216; A. 97.

The county canvassing board, utilizing only the tally sheet and Certificate of Memoranda from each precinct, tabulates the county vote. A. 98, 99-100. The county canvassing board may verify the machine vote in any precinct by inspection of the machine counters. Burns Ind. Stat. 29-5219. The paper ballots are required to be preserved by the clerk of the court in their sealed state for at least six months. Burns Ind. Stat. 29-5204. They are

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the state, including at least one in which appellant Roudebush filed a petition for recount (Wayne County) in which all the voting in the 1970 general election was done by paper ballots. A. 143. In precincts with voting machines, only absentee votes are cast by paper ballot.

not examined or inspected by the canvassing board. Burns Ind. Stat. 29-3212; A. 98.

When the county canvassing board completes its tabulation, the clerk of the circuit court (a member of the canvassing board) forwards to the secretary of state a certified statement reflecting the number of votes for each candidate for statewide office. Burns Ind. Stat. 29-5306. The election code provides for a ten-day period following this certification during which any error in such certification may be corrected.[12] Burns Ind. Stat. 29-5307.

Upon the expiration of the ten-day period for correction of errors, the secretary of state certifies to the governor the person having the highest number of votes as duly elected. The governor is thereupon required to give such person a certificate of election. Burns Ind. Stat. 29-5309. The certification by the Secretary of State to the governor of the election of appellee Hartke was made on November 16, 1970, and a certificate of election was thereupon issued to Hartke on December 3, 1970. A. 53-54.

The evidence before the district court, and its judicial knowledge of custom, practice and usage in Indiana (A. 60-61), indicate that in the conduct of a recount, it is the practice of recount commissions to open the respective bags in which the paper ballots counted and not counted had been sealed by the precinct election boards in the precincts subject to recount, and to make entirely new determinations as to whether a particular ballot should,

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12. At least two corrections were made in the county votes for the office of United States Senator certified to the secretary of state following the November 1970 general election, pusuant to this provision, including a correction in the Marion County vote. Plaintiff's Exhibit 1, A. 82, 85; Plaintiff's Exhibit 7, A. 84, 85, 130.

or should not be, counted. Ballots initially counted by a precinct election board may be rejected by a recount commission, and ballots rejected by the precinct election board may be deemed valid and counted. A. 104-106. In the event of a dispute among the members of a recount commission as to the validity of any particular ballot, that issue is determined by a majority vote of the commission. A. 110-111. The ballots themselves are sorted into different envelopes than those from which they were taken, on the basis of these new determinations by the recount commission. A. 107.

The district court found upon the evidence that there was no way in which a recount commission could "make a simple mathematical verification of the vote". A. 61. It concluded that the judgments which must constantly be made by a recount commission in order to determine which ballots to count and which ballots not to count transgressed the right of appellee Hartke "to have the returns of the November 3 election judged by the Senate and not piecemeal by various commissions appointed by various state courts." A. 58.

The district court also found upon the evidence that a recount would not only encroach upon the constitutional duty of the Senate under Article I, Section 5, but that to permit recounts to go forward would impair the ability of the Senate to perform its constitutional obligation. A. 67. The recount petition filed by Roudebush in Marion County averred that "through mistake or fraud" the votes were not correctly counted. A. 10. The range of conduct which those averments might encompass is almost infinite. Whatever their intended scope, it is the Senate which must judge whether and to what extent any such mistake or fraud existed, and the effect upon appellee Hartke's right to a seat in that body.

> It is clear that any kind of fraud in procuring an election . . . would properly be material to an inquiry for information in connection with the power of the Senate to judge the elections, returns and qualifications of its own members. *Seymour v. United States*, 77 F.2d 577, 584 (8th Cir. 1935)

It is essential to the performance of that judicial function that the evidence upon which that determination must be based, which indisputably includes the ballots, tally sheets and other election paraphernalia, should be preserved unimpaired.[13]

Moreover, notwithstanding any power which a court might have "to provide for the protection of all ballots and voting machines" (Burns Ind. Stat. 29-5413; Roudebush Appendix, A-7), the district court's observation concerning "piecemeal" judging points to another reason for legitimate concern with respect to the integrity of the election paraphernalia. The ballots and other paraphernalia in precincts subject to recount would be handled not by a single recount commission, but by 33 individuals, comprising 11 different recount commissions. Each commission is likely to have varying views as to the procedure to be adopted by it, and as to the standards governing its determination of the validity or non-validity of ballots. Each of the eleven courts which appoints a recount commission is likely to have a different view of its authority and responsibility protecting the ballots. The potential hazard of destruction or mutilation of ballots or of evidence of fraud reflected in the physical condition of the ballots or their containers is multiplied eleven-fold. And when the margin of victory is 4,383 votes out of a total

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13. The evidentiary nature of the ballots in contest proceeding is explicitly recognized by the Election Code. Burns Ind. Stat. 29-3212; Hartke Appendix, A-3, 4.

of 1,737,797, the effect of even a minor misadventure in the handling of the election material upon the ability of the Senate, as the exclusive arbiter, to determine disputed factual issues is abundantly clear.

These considerations underlie the determination by a majority of the district court that appellee Hartke would be irreparably harmed, and the Senate's constitutional prerogatives abridged. This court should not disturb those findings.

Conclusion:

The appeals should be dismissed for mootness, and Appellant Roudebush remitted to his remedies before the United States Senate. Alternatively, the order of the district court granting the preliminary injunction, and the judgment of the district court declaring the Indiana recount statute unconstitutional in its application to a United States senatorial election should be affirmed.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article 4, § 10 of the Indiana Constitution reads as follows:

§ 10. Officers — Procedure — Adjournment. — Each House when assembled, shall choose its own officers, the President of the Senate excepted; judge the elections, qualifications, and returns of its own members; determine its rules of proceeding, and sit upon its own adjournment. But neither House shall, without the consent of the other, adjourn for more than three days, nor to any place other than that in which it may be sitting.

The text of pertinent provisions of the Indiana Election Code (not reproduced in appellants' appendices) as they appear in Title 29, Burns Indiana Statutes, reads as follows:

29-3201. Precinct election boards — Members — Qualifications — Failure to serve — Filling vacancies — Primary election boards. — Except as hereinafter otherwise provided, the county election board shall appoint for each voting precinct in its county the precinct boards of election, each of which shall consist of one [1] inspector, and two [2] judges of opposite political faith who shall be qualified voters of the township in which they reside. Any member of any precinct election board who is not a resident of said precinct shall be entitled to vote by absent voters' ballot as provided in this act [chs. 28-60 of this title]. No person shall be eligible as a member of the board of election who has anything of value bet or wagered on the result of such election, or is a candidate to be voted

for at such election, or who is a husband, wife, father, mother, father-in-law, mother-in-law, son, daughter, son-in-law, daughter-in-law, grandfather, grandmother, grandson, granddaughter, brother, sister, brother-in-law, sister-in-law, uncle, aunt, nephew, niece, first or second cousin of any candidate at such election, or who is unable to read, write and speak the English language, and any such person so serving shall be guilty of a misdemeanor. If at any time before, or during an election it shall be made to appear to any inspector, by the affidavit of two [2] or more qualified electors of the precinct, that either of the judges is disqualified under the provisions of this article [§§29-3201—29-3216], he shall at once remove such judge and fill the place with a qualified person of the same political party as the judge removed; and, in case such disqualified judge shall have taken the oath of office prescribed, the inspector shall place such oath and affidavit before the next grand jury of the county.

If any member of an election board shall fail to appear at the hour appointed for the opening of the polls, the remainder of the board shall select a member of his political party to serve in his stead; Provided, That if the qualified electors of his party present at the polls shall nominate a qualified person for such vacancy, such nominee shall be appointed. If none of the members of an election board shall appear at the hour appointed for opening the polls, the qualified electors present shall elect a board viva voice, as nearly as possible in conformity with the provisions hereof; Provided, however, That precinct boards in a primary election shall consist of one [1] inspector, and two [2] judges of opposite political faith, each of whom shall be a qualified voter of the precinct in which they reside and serve. [Acts 1945, ch.

208, §25, p. 680; 1951, ch. 19, §1, p. 48; 1965, ch. 261, §3, p. 683.]

29-3212. **Filing of election returns.**—It shall be the duty of each inspector of elections, as soon as the certificates required by law to be signed by the precinct election boards have been signed, to deliver the same, with the poll list of voters and one [1] of the tally papers containing the vote of the precinct for all national, state, district and county officers voted for, and with the bags required by law to be returned by said inspector, to the clerk of the circuit court, at the office of such clerk or at the place of meeting of the board of canvassers, for the use of the board of canvassers, and said clerk shall be in attendance for such purpose. The board of county commissioners in each county shall provide said board of canvassers a proper receptacle or receptacles in which to place said sealed bags. Said receptacle shall be supplied with two [2] locks having different keys with which said receptacle can be securely locked. Upon their receipt, said sealed bags shall be placed in said receptacles and the same shall be securely locked, and one [1] of said keys shall be delivered to said county clerk and the other to the member of said board of canvassers opposite in politics to said clerk. The poll lists of voters and tally-sheets used by said board of canvassers in canvassing said vote shall be deposited in the office of such clerk and shall be open to public inspection. Said receptacles, when locked, shall likewise be lodged in such clerk's office. Said receptacles shall not be opened or their contents removed therefrom except upon the order of the circuit court of said county or the judge thereof in vacation. If, at the expiration of six [6] months from the date of such election, no proceeding is pending in which such ballots have been ordered held by any court for use as evi-

dence, said sealed bags shall be removed from said receptacles by the officials holding such keys and the same shall be destroyed. [Acts 1945, ch. 208, § 36, p. 680.]

29-4914. Handling of absent voter's ballot in precinct—Duties of election inspector—Procedure.—At any time between the opening and closing of the polls on such election day, the election inspector of such precinct, in the presence of the election board, shall open the outer or carrier envelope only, announce the absent voter's name and compare the signature upon the application with the signature upon the affidavit on the ballot envelope. In case the election inspector finds the affidavit properly executed and attested, that the signatures correspond, that the applicant is a duly qualified elector of the precinct, that he is duly registered, where registration is required, or that the applicant has not voted in person at such election, or, in case of a primary election, if he has not previously exercised the right of suffrage, if he shall have executed the proper declaration relative to his age and qualifications and the party with which he intends to affiliate, the election inspector shall open the envelope containing the absent voter's ballot in such manner as not to deface or destroy the affidavit thereon and take out the ballot or ballots inclosed therein without unfolding or permitting the same to be unfolded or examined. The inspector shall then deliver such ballot or ballots to the clerks, who shall at once proceed to write their initials, above the signature of the clerk of the circuit court or the secretary of state as the case may be, in ink on the lower lefthand corner on the back of each of such ballots in their ordinary handwriting and without any distinguishing mark of any kind and in the same manner as other ballots are required to be indorsed. The inspector shall thereupon deposit the same in the proper ballot-box or ballot-boxes

and enter the absent voter's name in the poll list, the same as if he had been present and voted in person. In the event that such affidavit is found to be insufficient, or that the signatures do not correspond, or that the applicant is not a duly qualified elector in such precinct or that he has voted in person at such election, or that he has not registered, if registration is necessary, or that the ballot is open, or has been opened and resealed, or that the ballot envelope contains more than one [1] ballot of any one kind, or in case of a primary election, and if such absent voter has not previously exercised the right of suffrage, if he shall have failed to execute the proper declaration relative to his age and qualifications and the party with which he intends to affiliate, each ballot or ballots shall not be accepted or counted. Every ballot not accepted or counted for any of the reasons hereinbefore enumerated shall, without unfolding the same to disclose how it is marked, be indorsed on the back thereof with the words: "Rejected ——— (giving the reason or reasons therefore)." All rejected absent voters' ballots shall be inclosed and securely sealed in an envelope on which the election inspector shall indorse the words: "Defective absent voters' ballot," with a statement of the precinct in which and the date of the election at which they were last signed by such inspector and returned to the same officer and in the same manner as by law provided for the return and preservation of official ballots cast and uncast at the election. [Acts 1945, ch. 208, §207, p. 680.]

29-5110. Announcing result—Record.—As soon as the polls of the election are closed, the inspector, in the presence of the judges and clerks, shall immediately lock the voting machine against voting and open the counting compartment, giving a full view of all the counter numbers to all members of the election board including clerks and

sheriffs. The inspector shall, in the order of the offices as their titles are arranged on the machine, read and announce in distinct tones the result as shown by the counter numbers. He shall also in the same manner announce the vote on each constitutional amendment, proposition or other question voted on. The vote so announced by the inspector shall be taken down by each of the clerks and recorded on books or papers prepared for that purpose. They shall record the number of votes received for each candidate on the regular ticket and also the number received by each person on the irregular ticket. The certificates of the number of votes cast for each person shall be made and signed as required in this act [chs. 28-60 of this title] in case of other election returns, and all statements of the number of votes required in this act in duplicate, triplicate or otherwise shall be made and signed by the election officers. And such certificates and other papers shall be returned to the office of the clerk of the circuit court in the same manner, under the same regulations and penalties as are prescribed in this act for election returns from precincts in which no voting machines are used. [Acts 1945, ch. 208, §279, p. 680.]

29-5111. **Locking machine.**—The inspector, as soon as the count is completed and fully ascertained, as required in section two hundred and seventy-nine [§29-5110] shall close and lock the machine against voting or being tampered with, and it shall so remain for a period of at least thirty [30] days except as provided in section three hundred and two [§29-5219]. When irregular ballots have been voted, the inspector shall return all of such ballots in a properly secured sealed package, indorsed "Irregular ballots," and indicating the precinct and county, and file such package with the clerk of the circuit court. It shall be preserved for six [6] months after such election and

may be opened and its contents examined only upon an order of a court of competent jurisdiction; at the end of such six [6] months, unless ordered otherwise by the court, such package and its contents may be destroyed. [Acts 1945, ch. 208, §280, p. 680.]

29-5201. Election boards—Canvass of vote in precinct—Disputed ballots—Procedure—Duty of election board.—The precinct election boards except as otherwise herein provided shall, in canvassing the votes, begin first with the state ballots and complete them before proceeding with the local ballots, by laying each ballot upon the table in the order in which it is taken from the ballot-box; and the inspector and the judge of election differing in politics from the inspector shall view the ballots as the names of the persons voted for are read therefrom. And in the canvass of the votes any member of the election board may protest as to the counting of any ballot, or any part thereof, and any ballot which is not indorsed with the initial of the clerks, as provided for in this act [chs. 28-60 of this title], and any ballot which shall bear any distinguishing mark or mutilation shall be void, and shall not be counted, and any ballot, or part of a ballot, from which it is impossible to determine the elector's choice of candidates, shall not be counted as to the candidate, or candidates, affected thereby; and all ballots, voted and not voted, together with all protested, disputed or uncounted ballots and certificates of the election board and tally sheets, shall be preserved by the inspector and at the close of the count placed in separate packages, together with the seals of the ballot packages, in paper bags securely sealed, and delivered to the clerk of the circuit court with notification of the number of ballots so placed in such bags, and of the condition of the seals of the ballot packages. The clerk shall also record on the

tally sheets memoranda of such ballots, and the condition of the seals of the ballot packages, and in any contest of election such ballots and seals may be submitted in evidence. And before said ballots are placed in the bag as aforesaid, one of the poll clerks shall indorse upon the back of each disputed or protested ballot the word "counted" or "not counted," as the case may be, and said indorsement shall be signed officially by both of said clerks. The election board shall immediately make a memorandum of the total vote cast for each candidate and deliver a copy thereof to each member of such board. [Acts 1945, ch. 208, §284, p. 680.]

29-5202. Certificate of precinct election board.—When the votes shall be counted, the election board shall make out a certificate, under their hands, designating the office and stating the number of votes each person has received, which number shall be written in words; and such certificate, together with one [1] of the list[s] of voters and one [1] of the tally papers, shall be deposited with the inspector, or with one [1] of the judges who shall be selected by the precinct election board. [Acts 1945, ch. 208, §285, p. 680.]

29-5203. Clerk's duties.—The clerk of the circuit court shall securely keep said envelope, containing certificates of the election board, tally paper and ballots, so sealed, with the ballots and papers therein in the same condition as it was received by him from the inspector, in his office unless opened by said inspector in the presence of the board of canvassers as herein provided, for the period of six [6] months. But when such election is contested, he shall preserve them so long as such contest is undetermined, subject to the order of the court trying such contest: Provided, That said inspector shall, after sealing said envelope containing such ballots and one [1] of the

tally papers, plainly mark said envelope upon the outside, in ink, with the name, number and township. [Acts 1945, ch. 208, §286, p. 680; 1949, ch. 25, §22, p. 43.]

29-5204. Disposition and care of ballots—Penalty.—As soon as the ballots cast in any primary or general election held in this state shall have been counted, they, together with all uncast ballots shall, in the presence of the judges and clerks, be carefully and securely placed by the inspector in a strong and stout paper envelope or bag, which shall then be tightly closed and well sealed with wax by the inspector, and shall be delivered by such inspector to the clerk of the circuit court of the county at the very earliest possible period before or on the Thursday next succeeding such election, and the inspector shall securely keep said envelope containing the ballots and papers therein and permit no one to open said envelope or touch or tamper with said ballots or papers therein. And upon the delivery of such envelope to the clerk, the inspector shall take and subscribe an oath, before said clerk, that he has securely kept said envelope and the ballots and papers therein, and that, after said envelope had been closed and sealed by him in the presence of the judges and clerks, he had not suffered or permitted any person to break the seal or open said envelope, or touch or tamper with said ballots or papers, and that no person has broken such seal or opened said envelope, to his knowledge; which oath shall be filed in said clerk's office with the other election papers. The clerk of the circuit court of the county shall preserve such ballots for at least six [6] months from the date of receiving them, during which time they shall be subject only to the demand of the judge of any circuit or Superior Court of this state, in connection with any litigation arising from the primary or general election at which they were cast, and at the end of six [6] months,

he shall destroy them. [Acts 1945, ch. 208, §287, p. 680; 1949, ch. 25, §23, p. 43.]

29-5206. Voting machines—Procedure.—In those counties employing voting machines at any primary or election, the vote, as registered on such machines, shall be taken and certified at the precinct polling-place upon the closing of the polls by the precinct election boards on forms to be supplied to such precincts. When such totals shall be so taken and certified, each such machine shall be sealed by the inspector in the presence of such precinct election board. Copies of such totals so taken and properly certified by all members of such boards shall then be delivered to each member of such board and the original and one [1] duplicate thereof shall promptly be delivered by the inspector to the clerk of the circuit court with any ballot boxes and all other precinct election papers of such precinct. The voting machines used in any such precinct after sealing, as aforesaid, shall remain at the precinct polling place until collected. [Acts 1945, ch. 208, §289, p. 680; 1949, ch. 25, §24, p. 43.]

29-5208. Board of canvassers—Times and places of assemblies.—In each county in the state the county election board shall constitute a county board of canvassers, who shall canvass and estimate the certificates, poll lists and tally papers returned by each inspector of elections in the county, for which purpose the board shall assemble in a room in the courthouse provided for it by the board of county commissioners, at six o'clock P.M., upon the day of each election: Provided, That in all counties of two hundred fifty thousand [250,000] inhabitants or more as shown by the last preceding United States census, wherein a general, state or county election or primary election is to be held, the board of county commissioners of such county shall upon the written request and order made upon

them by the judge of the circuit court of said county, at least ten [10] days before any such election, provide a suitable assembly room for such board of canvassers, other than the circuit courtroom of said county. [Acts 1945, Ch. 208, §291, p. 680; 1947, ch. 120, §32, p. 364; 1963, ch. 152, §1, p. 177.]

29-5209. Chairman — Clerk. — The members of the county canvassing board shall select one [1] of their numbers as chairman, and the clerk of the circuit court shall act as clerk of such board. [Acts 1945, ch. 208, §292, p. 680.]

29-5211. Board's duties.—Such county board of canvassers, when organized, shall carefully compare and examine the papers entrusted to it, and aggregate and tabulate from them the vote of the county, township, or the vote of the city, as the case may be, a statement of which shall be drawn up by the clerk, which shall contain the names of the persons voted for, the office, the number of votes given in each precinct, ward or township in a county election, and in each ward and precinct in a city election to each person; the number of votes given to each in the county or city and also the aggregate number of votes given, which statement shall be signed by each member of such board, and canvass sheets, together with such certificates, and tally papers, shall be delivered to the clerk, and by him filed in his office; and the same shall be preserved by him open to inspection of any legal voter. [Acts 1945, ch. 208, §294, p. 680.].

29-5212. Certificate.—Such county board of canvassers shall declare the persons having the highest number of votes given for any office to be filled by the voters of a single county, township, or municipal subdivision thereof duly elected to such office, and certify the same in the

statement above required. [Acts 1945, ch. 208, §295, p. 680.]

29-5214. Defective papers—Duty of board.—No tally papers, poll lists or certificates returned from any election board shall be rejected for want of form or for lack of being strictly in accordance with the directions contained in this act [chs. 28-60 of this title], if such certificates can be satisfactorily understood, and such board of canvassers shall in no case reject the returns from any precinct if the same be certified by the board of election of that precinct as required in this act, and returned by the inspector or one [1] of the judges of said board. [Acts 1945, ch. 208, §297, p. 680.]

29-5216. Election returns—Inspector and clerks.—It shall be the duty of each inspector of elections, as soon as the certificates required in this act [chs. 28-60 of this title] to be signed by the precinct election boards have been signed, to deliver the same, with one [1] of the tally papers containing the vote of the precinct for all state, district, county, city, and township officers voted for, and with the bags required in this act to be returned by said inspector to the clerk of the circuit court at the courthouse for the use of the board of canvassers except as otherwise herein provided, and that there may be no delay in the canvassing of the vote of any county, township, or city, it is declared to be the duty of the clerk to keep the clerk's office open all night upon the night of any election at which county, township, or city officers are voted for. [Acts 1945, ch. 208, §299, p. 680.]

29-5218. Rules for counting votes.—Rule 1. The whole ballot is void if the voter (a) does any act extrinsic to the ballot such as inclosing any paper or other article in the folded ballot or (b) makes any mark thereon other than

a cross X mark on or in a voting square or circle, or other than the writing in of a name for the purpose of voting; except that an erasure shall not make the ballot void, but shall render it blank as to the office, party position or question in connection with which it is made. In applying any provision of this section to a primary election, the term "voting square" shall include the voting space at the left of the name of a candidate on the primary ballot.

Rule 2. A cross X mark, made by a voter, on or in a voting square at the left of a candidate's name shall be counted as a vote for such candidate.

Rule 3. A cross X mark, made by the voter, on or in a voting square following the word "Yes" or the word "No," before a constitutional amendment or other question submitted, shall be counted in the affirmative or negative as so indicated.

Rule 4. If the voter marks more names than there are persons to be elected or nominated for an office, or elected to a party position, or if for any reason it is impossible to determine the voter's choice of a candidate or candidates for an office or party position, or his vote upon a question, his vote shall not be counted for such office or position or upon the question, but shall be returned as a blank vote thereon.

Rule 5. A cross X mark, made by the voter, on or in a circle above a column, known as a party column, shall be counted as a vote for each candidate named in such column.

Rule 6. If the cross X mark touches a circle or a square, it shall be counted as if on or in such circle or square.

Rule 7. The intent of the voter shall be the primary factor to be considered in determining the voter's choice

on a ballot, and if such intent may be determined on the ballot or part of a ballot then the vote shall be counted as to the candidate or candidates effected [affected] thereby: Provided, however any part of a ballot, from which it is impossible to determine the elector's choice of candidates, shall not be counted as to the candidate, or candidates, affected thereby.

Rule 8. Any ballot on which an elector shall write his name, initials or a number or special symbol such as a star, circle, parallel lines, circle, dots or any combination thereof shall be void. [Acts 1945, ch. 208, §301, p. 680; 1947, ch. 156, §1, p. 481; 1965, ch. 245, §1, p. 624.]

29-5219. Verification of vote on machines.—The county election board may, in any county or city of this state wherein voting machines shall be used, at the time it convenes to count and tally the vote, or as soon thereafter as it conveniently can do so, and either before it proceeds to count and tabulate the vote or within one [1] day after the count and tabulation is finished, inspect the registering counter, or other mechanical recording device on any such voting machine or machines showing the number of votes cast for any candidate or question voted on at any such election and any irregular ballots recorded thereon or therein. In making such inspection the board shall compare the number of votes shown by such voting machine or machines to have been cast for each candidate voted for, on and by such voting machines and each question submitted to the voters voting thereon or thereby with the returns made by the precinct boards of the several precincts in which said voting machines were used at such election. In case there is a discrepancy between the returns so made by the precinct board or boards and the number of votes shown by the voting machines on such inspection,

then it shall be the duty of the county election board to correct the returns made by the precinct election board or boards, so as to make such election returns conform to the vote shown by such machines on such inspection as aforesaid. The corrected returns shall thereupon and thereafter be regarded and deemed by the board as the true and correct return of the number of votes cast for each candidate voted for and each question voted on, in the precinct the returns from which shall have been so corrected.

In case of any election contest the returns of the precinct boards, as corrected by the board as aforesaid, shall be prima facie evidence of the vote cast for each candidate and on each question voted on at any election, to the same extent and in the same manner, and not otherwise, as is the tabulation and return of the vote in precincts where voting machines are not used. For the purpose of inspecting such voting machines the members of the county election board may proceed to any place within the county where the voting machines are located, kept or stored. Provided, That such verification of the voting machine returns shall be made in the presence of a duly accredited representative of each of the two [2] dominant political parties. [Acts 1945, ch. 208, §302, p. 680.]

29-5306. Certificate to secretary of state.—Clerks of the circuit courts, on the day succeeding the return day of such election, shall make out, in words, certified statements, officially sealed, of the number of votes given to each presidential elector, each person for United States senator, for representative in congress, for governor and lieutenant-governor, for judges of the Supreme, Appellate and circuit courts, clerk of the Supreme Court, reporter of the Supreme and Appellate Courts, attorney-general,

prosecuting attorney, superintendent of public instruction, secretary of state [,] auditor, and treasurer of state, and for senator and representative in the general assembly, and shall send the same by registered mail, return receipt requested, to the secretary of state. [Acts 1945, ch. 208, §319, p. 680.]

Compiler's Note: The bracketed comma was inserted by the secretary of state.

29-5307. Error in certification of vote—Correction.—Any error in the certification of the vote for any candidate at any general, special or city election discovered within ten [10] days after such certification shall be corrected by the clerk of the circuit or the secretary of state, as the case may be, making such erroneous certification. Should the clerk of the circuit court or the secretary of state fail or refuse to correct such error, the duty to make the correction may be enforced by an action in mandamus brought by any duly qualified voter within five [5] days after the expiration of the ten [10] day period allowed for making such corrections. Such action shall be brought in the circuit or superior court of the county where the officer or board making the certification is domiciled.

No certificate of election shall be issued until the ten [10] day period for the discovery and correction of errors has expired. [Acts 1945, ch. 208, §320, p. 680.]

29-5309. Congressmen—Duties of secretary of state and governor.—The secretary of state as soon as he shall receive such certified statements, shall compare and estimate the votes given for United States senator and for representative in congress, and certify to the governor the persons having the highest number of votes as duly elected; and the governor shall give to each of the persons returned to him as aforesaid a certificate of his election,

sealed with the seal, and attested by the secretary of state: Provided, That no return of any county which has come into the hands, and which has been duly authenticated by the clerk of the circuit court thereof, under seal, as hereinbefore provided shall be rejected by said secretary of state, but he shall estimate, aggregate and tabulate, and report to the governor the total number of votes cast in each county for each candidate for state office, supreme judge or other officer to be elected by all the voters of the state, and members of congress, as evidenced by the face of such returns so certified to him. [Acts 1945, ch. 208, §322, p. 680.]

29-5803. Purchase of machines—Guaranty—Precincts—Custody while not in use.—The board of commissioners of every county in this state shall adopt and purchase or procure for use in the various precincts of the county, voting machines approved in the manner set forth in this act [chs. 28-60 of this title] by the state election board, and none other: Provided, That the board of commissioners shall purchase or procure no voting machine unless the party or parties selling it shall guarantee, in writing, to keep the machine in working order for not less than five [5] years without additional cost to the county, and give a bond conditional to that effect: Provided, That it shall be the duty of such board of commissioners to adopt and purchase or procure no such machine unless they are themselves satisfied that it complies with the requirements of section three hundred eighty-two [§29-5802] in this act, and that it is thoroughly reliable and correct in its operation, readily understood and operated, can not be fraudulently manipulated, and will unquestionably maintain the secrecy of the ballot: Provided, further, That if it shall be impossible to supply each and every election district with a voting machine or voting machines at any

election following the adoption of such machines in a county, as many shall be supplied as it is possible to procure, and the same shall be used in such precincts of the county as the county election board shall order.

The clerks of the various circuit courts shall have the care and custody of all voting machines while not in use. [Acts 1945, ch. 208, §383, p. 680; 1951, ch. 208, §1, p. 555; 1965, ch. 261, §24, p. 683.]